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DIGEST OF RECENT VIRGINIA DECISIONS.

Supreme Court of Appeals.

Note.—In this department we give the syllabus of every case decided by the Virginia Supreme Court of Appeals, except of such cases as are reported in full.

DINSMORE *v.* DINSMORE.

Nov. 18, 1920.

[104 S. E. 785.]

1. **Divorce (§ 133 (3)*)—Wife Held to Have Established Charge of Husband's Desertion Entitling Her to Decree.**—Plaintiff wife, seeking a divorce under Code 1919, § 5103, for willful and long-continued abandonment and desertion, held to have established her charge of willful desertion, entitling her to divorce a vinculo matrimonii and the custody of the children.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 738.]

2. **Divorce (§ 56*)—Court Should Deny Relief Where Collusion Appears.**—The court should consider the testimony on an uncontested application for divorce with the most painstaking and scrupulous care, and, if collusion or consent appears, directly or indirectly, should deny the relief sought.

Appeal from Circuit Court, Rockingham County.

Suit for divorce by Mrs. Willie Dinsmore against Robert B. Dinsmore. From decree for defendant, plaintiff appeals. Decree reversed, and decree of divorce entered for plaintiff.

Chas. A. Hammer and John Paul, both of Harrisonburg, for appellant.

RICHARDSON *v.* COMMONWEALTH.

Sept. 16, 1920.

[104 S. E. 788.]

1. **Homicide (§ 31*)—"Murder," "Voluntary Manslaughter," and "Involuntary Manslaughter" Distinguished.**—Where a killing occurs in the course of a sudden quarrel, in mutual combat, or from sudden provocation, without previous grudge, and from heat of passion, it is not "murder," but manslaughter only, being "voluntary manslaughter" if there be no further justification, and

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

"involuntary manslaughter" if done in the commission of some lawful act, such as justifiable self-defense.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Involuntary Manslaughter; Murder; Voluntary Manslaughter.]

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 114, 122, 125.]

2. Homicide (§ 39, 146*)—Presumption of Malice Occurs in Killing from Sudden Heat of Passion Only Where Provocation is Very Slight.—Where a killing was without previous grudge, even if not done in self-defense, the test whether it was from sudden heat of passion is found in the nature and degree of provocation and the manner in which it is resented, and if without any, or upon very slight, provocation, malice may be inferred from the fact of the killing, and the slayer may be convicted of murder; but where the provocation is more than very slight, such presumption does not arise.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 114, et seq.]

3. Homicide (§ 254*)—Evidence of Malice Held Insufficient to Support Conviction of Second Degree Murder.—Where the evidence showed a killing in the course of a sudden quarrel, in mutual combat, upon sudden provocation, the provocation was more than very slight, and murder could not be presumed from the killing, and there being no other evidence of malice a verdict of murder in the second degree is not supported by the evidence.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 120, et seq.]

4. Homicide (§ 214 (1)*)—Dying Declaration that Deceased Was Only Playing with Accused Held Not Competent Evidence of Slight Provocation.—Where a killing occurred in a sudden quarrel and in mutual combat and upon sudden provocation, and the accused claimed self-defense, deceased's dying declaration that he was not mad and did not know what made accused shoot, is not competent evidence of slight provocation, since it relates to deceased's inner consciousness, and not to outward conduct, of which accused could have knowledge.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 144, et seq.]

5. Homicide (§ 116 (4)*)—Accused Could Act in View of Deceased's Conduct as it Reasonably Appeared.—Accused had the right to act in view of deceased's conduct as it reasonably appeared to him at the time of the combat and killing.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 159, et seq.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

6. Homicide (§ 286 (3)*)—An Instruction on Willful and Premeditated Killing Held Not Supported by the Evidence.—An instruction that a mortal wound given with a deadly weapon in slayer's previous possession, without any, or upon very slight, provocation, is *prima facie* willful, deliberate, premeditated killing, requiring accused to prove extenuating circumstances, held erroneous, because without evidence to support it.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 155, et seq.]

Error to Circuit Court, Russell County.

One Richardson was convicted of murder in the second degree, and he brings error. Reversed, and new trial awarded.

Finney & Wilson, of Lebanon, for the plaintiff in error.

John R. Saunders, *Atty. Gen.*, and *J. D. Hank, Jr.*, *Asst. Atty. Gen.*, for the Commonwealth.

EWING et al. *v.* DUTROW et al.

Nov. 18, 1920.

[104 S. E. 791.]

1. Equity (§ 46*)—No Jurisdiction of Suit for Damages for Fraudulent Sale of Stock.—The remedy at law being full, adequate, and complete, equity has no jurisdiction of a suit merely for damages for fraudulent representations in a sale of stock, there being no question of complicated accounts, but the fact for determination being whether the true condition of the corporation's business was fairly indicated in the financial statements and representations alleged to have been made by defendants, and this though testimony of expert accountants may be necessary.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 476.]

2. Appeal and Error (§ 1107*)—Change in Decree Authorized Only in Case of Reversal.—The decree dismissing the bill because not within equitable jurisdiction having been right as the law stood at the time, the case cannot be remanded, with direction to transfer to the law side, Code 1919, § 6365, authorizing the appellate court to make a change in the decree only where it is reversed in whole or part.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 619, et seq.]

Appeal from Circuit Court, Rockingham County.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.